

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

**FILED**

JUN 23 2016

Clerk, U.S. District Court  
District Of Montana  
Billings

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

JOSHUA ROBERT LUDTKE,

Defendant/Movant.

Cause No. CR 09-67-BLG-SPW  
CV 16-97-BLG-SPW

ORDER TRANSFERRING § 2255  
MOTION AND DENYING  
CERTIFICATE OF APPEALABILITY

On June 17, 2016, Defendant Ludtke, acting *pro se*, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

As Ludtke says, the instant motion is his first § 2255 motion under *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (2015). But it is still his second motion under § 2255. Ludtke filed his first § 2255 motion on September 7, 2011. *See* Mot. § 2255 (Doc. 28). The motion and a certificate of appealability were denied on December 12, 2011. *See* Order (Doc. 45). Ludtke did not appeal.

The Court of Appeals has not authorized Ludtke to file a second § 2255 motion in this Court, *see* 28 U.S.C. §§ 2255(h), 2244(c), so this Court lacks jurisdiction, *Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam).

The Court of Appeals, however, has jurisdiction to hear an application for leave to file a second or successive motion. 28 U.S.C. § 2244(b)(3). Because


Ludtke makes a claim under *Johnson v. United States*, \_\_ U.S. \_\_, 135 S. Ct. 2551 (2015), and because he might be qualified for relief, it is in the interests of justice to transfer his motion to the Court of Appeals to cure this Court's want of jurisdiction. 28 U.S.C. § 1631.

A certificate of appealability is denied because this Court clearly lacks jurisdiction and Ludtke's opportunity to file under *Johnson* is protected by transferring his motion to the Court of Appeals. *Gonzalez v. Thaler*, \_\_ U.S. \_\_, 132 S. Ct. 641, 648 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Accordingly, IT IS HEREBY ORDERED as follows:

1. Ludtke's § 2255 motion (Doc. 46) is DISMISSED in this Court and TRANSFERRED to the Court of Appeals as an application for leave to file a second or successive § 2255 motion in this Court.
2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Ludtke files a Notice of Appeal;
3. The Clerk of Court shall ensure that all pending motions in this case and in CV 16-97-BLG-SPW are terminated and shall close the civil file by entering a judgment of dismissal and transfer to the Court of Appeals.

DATED June 23<sup>rd</sup>, 2016.

  
Susan P. Watters  
United States District Court